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NO. _____

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SUPREME COURT OF THE UNITED STATES

KERRY J. MONICK, M.D.

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lloyd Charton
17480 East Seventeenth Street
Tustin, California

Attorney for Petitioner
Counsel of Record

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER PETITIONER WAS DENIED DUE PROCESS BY LAW BY THE GOVERNMENTS FAILURE TO DISCLOSE TO THE DEFENSE MATERIAL EVIDENCE FAVORABLE TO THE PETITIONER.

II. WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE MISCONDUCT OF THE GOVERNMENT IN USING THREATS AND INTIMIDATION TO COERCE WITNESSES TO SUPPRESS TESTIMONY FAVORABLE TO THE PETITIONER AND EMPHASIZE TESTIMONY DAMAGING TO THE PETITIONER.

III. WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL, AS GUARANTEED BY THE SIXTH AMENDMENT, BY THE FAILURE OF PETITIONER'S TRIAL COUNSEL TO ADDUCE FROM WITNESSES FAVORABLE TESTIMONY CRITICAL TO THE DEFENSE.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, KERRY J. MONICK, M.D., respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit which affirmed Petitioner's conviction by the United States District Court and the denial of the United States District Court of Petitioner's motion for new trial based on newly discovered evidence.

OPINIONS BELOW

The United States Court of Appeals for the Ninth Circuit issued a Memorandum Opinion on December 27, 1984, under Court of Appeals case numbers 83-1225 and 84-1189 (D.C. No. CR 82-1009-1-HMF).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 38 U.S.C. Section 1254(1) on the grounds that her rights under the Fifth and Sixth Amendments to the United States Constitution were violated.

The United States Court of Appeals for the Ninth Circuit entered its order rejecting petitioner's Fifth and Sixth Amendments claim on December 27, 1984.

The instant Petition for Writ of Certiorari is filed within sixty days of the order.

CONSTITUTIONAL PROVISION

AND STATUTES

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Petitioner was charged in the District Court of the District of Hawaii with 80 counts of mail fraud, 18 U.S.C. Section 1396(h) based upon allegations that she committed those criminal acts in the State of Hawaii while she lived and practiced there as a psychiatrist.

Petitioner was convicted of a total of 160 counts of Medicaid and mail fraud in the United States District Court for the District of Hawaii on April 12, 1983.

After denial of her Motion for New Trial, Petitioner appealed to the Ninth Circuit Court of Appeals, Case No. 83-1225. While said appeal was pending, Petitioner filed a further Motion for New Trial on the basis of newly discovered evidence, consisting of affidavits of three prosecution witnesses stating that they had made statements exculpatory to

Petitioner prior to trial which were not repeated at trial due to coercion by the prosecution or ineffectiveness of petitioner's counsel. Denial of this Motion was appealed to the Ninth Circuit Court on Case No. 84-1189.

The two appeals before the Ninth Circuit were consolidated, and that Court on December 27, 1984 affirmed the judgment of the District Court, whereupon follows this Petition.

ARGUMENT

I. THE COURT SHOULD GRANT CERTIORARI AS A SOUND EXERCISE OF ITS POWER OF REVIEW.

U.S. Sup. Ct. Rule 17, 28 U.S.C., underscores the discretionary nature of the writ of certiorari, limiting grant thereof to such occasions, "when there are special and important reasons therefore." Sanction by the Court of Appeals of a District Court decision which departs from "the accepted and usual course of judicial proceedings," calling for exercise of the Court's supervisory power, is specifically designated as a consideration favoring certiorari, (Id., Rule 17.1(2)).

The Court amplified upon the meaning of "special and important reasons" in the case of Rice v. Sioux City Memorial Park Cemetary, 349 U.S. 70 (1955)

holding that the issues involved must relate to problems beyond the academic or episodic, but rather reaching constitutional dimensions.

The several violations of Petitioner's Fifth and Sixth Amendment rights in the case at bar cry out for an exercise of the Court's power of supervision. Petitioner's liberty, professional career and good name are in eminent jeopardy because of a conviction tainted by prosecutorial misconduct and failure to disclose material exculpatory evidence, and by ineffective assistance of counsel, as is more particularly set forth herein.

II. PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE GOVERNMENT'S FAILURE TO DISCLOSE TO THE DEFENSE MATERIAL EVIDENCE FAVORABLE TO THE PETITIONER.

The leading case defining the obligation of the prosecution to disclose

material, exculpatory evidence remains Brady v. Maryland, 373 U.S. 83 (1963).

In Brady, the defendant was convicted of murder during a robbery and sentenced to death. His companion, Boblit, was tried separately, and after Brady. Subsequent to Brady's conviction, and the affirmance of that conviction on appeal, it was discovered that an extrajudicial statement of Boblit existed wherein he admitted that it was he who actually committed the murder, not Brady. This statement however, had been suppressed by the prosecution. Brady then moved for a new trial based on the newly discovered evidence. Although the trial court denied relief, the Supreme Court affirmed the Court of Appeal's reversal, finding a denial of due process in the

suppression of the evidence by the prosecution. (Id. at 84, 86.)

While a specific defense request for the information is unnecessary to find a Brady violation (United States v. Goldberg, 582 F.2d 483,485 (9th Cir. 1978)), three factors must be present: 1) the nondisclosed evidence must be material; 2) its contents must be favorable to the defendant; and 3) the exculpatory evidence must not have been included in any other report provided to the defendant. U.S. v. Van Brandy, 726 F.2d 548,551 (9th Cir. 1984). Further, the test to be used is whether the nondisclosed evidence creates a reasonable doubt which otherwise failed to exist. All doubts should be resolved in favor of full disclosure. (Id.) As will be discussed below, each of these factors is present in the instant case.

A. The Suppressed Evidence Was Material.

Whether an item of undisclosed evidence is material to the defense of the accused depends on "whether the undisclosed evidence was so important that its absence prevented the accused from receiving his constitutionally-guaranteed fair trial." United States v. Hibler, 463 F.2d 455, 459 (9th Cir. 1972).

The fact that trial counsel may not have specifically requested the information which was not divulged or that a diligent defense attorney might have discovered the information, or that the prosecution did not suppress the evidence in bad faith are not conclusive; "due process can be denied by the failure to disclose alone." (Id.) See also Hilliard v. Spaulding, 719 F.2d 1443 (9th Cir. 1983).

In the instant case, the undisclosed evidence went to an essential element of the charged offenses, the mens rea. As part of its case in chief the government must prove beyond a reasonable doubt that the defendant acted with an intent to defraud. United States v. Goss (5th Cir. 1981) 650 F.2d 1136,1344-1345; United States v. Freeman (5th Cir. 1980) 619 F.2d 1112,1117, cert. den. 450 U.S. 910 (1981); United States v. Kent, (5th Cir. 1979), cert. den. 446 U.S. 936 (1981).

Accordingly, defendant's good faith is a defense to charges of mail fraud, and, by analogy, to charges of medicaid fraud. United States v. Goss, supra at 1344-45. United States v. Foshee, 578 F.2d 629, 634 (5th Cir. 1978). Failure by the Trial Court to instruct the jury as to the good faith defense where there is some evidence to support the defense

is reversible error. United States v. Curry, 681 F.2d 406; (5th Cir. 1982).

In the case at bar, Dr. Monick submitted affidavits of three witnesses familiar with the operation of her office to the District Court and the Court of Appeals, showing that each of these witnesses had insisted to governmental prosecutors that Petitioner had acted in good faith and without intent to defraud the Medicaid agency. These affidavits are attached hereto as Exhibits "A," "B," and "C" for the Court's convenience.

Had the defense been apprised of these statements before trial, evidence of the Petitioner's good faith could have been presented at trial, entitling the Petitioner to an instruction on the good faith defense under Curry, supra.

Nondisclosure of the witnesses statements deprived the Petitioner of a critical defense, and thus denied her "constitutionally guaranteed fair trial." The withheld evidence meets the Hibler standard of materiality.

B. The Non-Disclosed Evidence Was Favorable to Petitioner.

The fact that the evidence which was undisclosed below meets this aspect of the Van Brandy standard can hardly be disputed. As noted above, the good faith of Dr. Monick would be a complete defense to a criminal prosecution which requires the government to prove beyond a reasonable doubt that there was an intent to defraud. United States v. Curry, supra.

In his affidavit, Mr. Clarence G. Steadman states:

I explained to Mr. Vierra and Mr. George Yamamoto, who was the special prosecutor for the Medicaid Fraud Unit in Hawaii, that at no time did Dr. Monick or any member of the therapeutic team attempt to defraud, rip-off, steal from, or in any way act in bad faith towards any patient or insurance company or the Medicaid system that had been billed for our services, in my opinion. In fact, I stated in my conversation with Mr. Vierra and/or Mr. Yamamoto that at no time did any member of our therapeutic team act in any other manner that would have been contrary to our good faith approach as a team and that I didn't really understand what this intense investigation was all about. It should also be noted that I objected to the prosecution of Dr. Monick to Mr. Vierra and Mr. Yamamoto before I testified in front of the Oahu grand jury and at her trial. I also stated to Mr. Vierra and Mr. Yamamoto that I didn't really understand how they could particularly pinpoint any of the billing since our secretarial staff left much to be desired and that I was sure the billing process would more than likely reflect the chaotic state our secretarial staff seemed to be in most of the time.

It should also be noted that at the time of the trial while I was a witness for the prosecution, I was very surprised that the government decided to prosecute Dr. Monick,

> and I was particularly surprised when it was not brought out by either side that I was always of the opinion that Dr. Monick always acted in good faith since I had told this to the prosecution on several occasions.

Affidavit of Clarence G. Steadman, Exhibit "A" at 3-4 (Emph. added.)

In addition, the affidavit of Pat McClain (attached hereto as Exhibit "B") indicates that Ms. McClain also disclosed the fact that Dr. Monick acted in good faith in her dealings with Medicaid and attributed mistakes in billing to the chaotic state of bookkeeping at the clinic. (See pp. 2 and 3 of that affidavit.) She expressly notes that the idea for the two appointment books was a suggestion of Mr. Ho of the HMSA rather than a scheme to cover fraud. (See p. 2 of that affidavit.)

Finally, the affidavit of Mr. Carl Weisbrod discloses further facts which can lead only to a finding of faulty

bookkeeping procedures rather than an intent to defraud. (See Exhibit "C" hereto: "He [referring to Mr. Ho from the HMSA] suggested to me several times we needed to 'clean up our record-keeping act'.") Also, Mr. Weisbrod's affidavit supports the earlier affidavit of Ms. McClain as to the suggestion by Mr. Ho to keep two appointment books to avoid having personal notes appear in those records. (See p. 1 of the Weisbrod affidavit.)

It is not necessary that the challenged evidence be material to the extent that an acquittal is certain to result from its introduction into the trial. Rather it is only necessary that such evidence could have raised a reasonable doubt in the mind of the jury.

In Bagley v. Lumpkin, 719 F.2d 1462, 1463 (9th Cir. 1983), the defendant appealed from the District Court's order denying

his motion to vacate, set aside or correct his sentence. His contention was that the government willfully failed to disclose impeachment evidence that he requested prior to trial and that that failure to disclose effectively denied him his right to cross-examine and confront two key government witnesses.

In Bagley, two police officers, O'Connor and Mitchell, testified against defendant at trial. Prior to trial the defense attorneys requested that the prosecutor disclose various items of information including whether or not any of its witnesses were going to be paid for their testimony. The government responded that neither O'Connor nor Mitchell were expected to receive compensation for their services. In mid-1980, under the Freedom of Information Act, Bagley finally discovered that

O'Connor and Mitchell did in fact receive compensation from the government before and after the trial in 1977. However, during a hearing on his motion, the District Court determined that the failure of the prosecution to divulge this information in a nonjury trial was harmless beyond a reasonable doubt. The Ninth Circuit determined that in a Brady violation, the harmless error rule should apply. Goldberg, supra, 582 F.2d at 448-490).

Determining that the government's failure to produce the requested information was a serious due process violation, the Court reversed. Citing Hibler and Goldberg, the Court noted that a new trial is required whenever there is a reasonable possibility that the error materially affected the verdict and that

the failure to disclose Brady information which the defendant could have used to conduct an effective cross-examination of the adverse witness seriously threatened the defendants confrontation right and therefore his right to a fair trial. Bagley, supra, 719 F.2d at 1464.

Both aspects of the Bagley decision are present here. First, given that an intent to defraud is a necessary element of the offense, and that the good faith of petitioner would be a defense to the charges herein, a reasonable possibility exists that such information would raise a reasonable doubt in the minds of the jurors. Secondly, the nondisclosure and the coercive tactics of the prosecutor, described infra, have effectively deprived

Petitioner of the ability and right to cross-examine the witness who testified under pressure from Mr. Yamamoto and thus deprived her of her constitutional right to confront those witnesses. It is respectfully submitted that the second prong of the Van Brandy test has been met.

C. The Exculpatory Evidence Was Not Only Undisclosed in Any Other Document to be Given to Petitioner, but Instead, Purposely Kept From Petitioner Through the Coercive Tactics of the Government Prosecutor.

While the government does not contend that the exculpatory statements were provided in any report or other document, it is the position of Petitioner that the actions of the government went beyond mere non-disclosure to reach the level of suppression through coercion.

The attached affidavits disclose that certain pressures were brought to bear on the witnesses who testified for the prosecution.

In light of the fact that these witnesses who testified are still under a great deal of pressure from the prosecutor, it is a testament to the courage of these witnesses that they come forward even now.

It is now well settled that a prosecutor is presumed to recognize evidence in his files which is highly probative of the innocence of the accused. United States v. Agurs, 427 U.S. 97, 110 (1976). Further, "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." Id.

This critical evidence, however, was suppressed, not disclosed.

D. Due Process Requires Reversal.

Contrary to the trial court's ruling denying the motion for a new trial, there is no requirement that the newly discovered evidence be of a degree that requires acquittal.

(Order Denying Motion for a New Trial, p. 2, filed May 21, 1984.) The only requirements are that the evidence be material, favorable and likely to raise a reasonable doubt which did not otherwise exist. Van Brandy, supra, 726, F.2d at p. 551. Further, this Court has expressly stated where the evidence was available to the prosecutor and not submitted to the defense, the "defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." Agurs, supra, 427 U.S. at 111.

It is respectfully submitted that the government's failure to disclose material, favorable evidence to the defense deprived Petitioner of her right to due process under the law. Brady v. Maryland, supra, United States v. Goldberg, supra, United States v. Van Brandy, supra, Certiorari should issue, and the conviction must be reversed.

III. PETITIONER'S RIGHT TO DUE PROCESS UNDER THE LAW WAS VIOLATED BY PROSECUTORIAL MISCONDUCT.

In both the District Court and the Court of Appeals, the Government has argued that even if the exculpatory statements of the three witnesses were improperly withheld, the favorable evidence of Dr. Monick's good faith could have been adduced at trial by proper cross examination. This argument fails on two grounds. First, the question of whether or not the favorable testimony could or should have been brought out on cross-examination is irrelevant to the finding of a Brady violation. United States v. Van Brandy, 726 F.2d 548,551 (9th Cir. 1984).

Secondly, the failure of the defense to bring out the favorable evidence of Petitioner's good faith at trial can only be explained by one of two possibilities: Either the government's threats, intimidation and bullying effectively coerced the witnesses

into altering their testimony on that point, amounting to prosecutorial misconduct in violation of Petitioner's Fifth Amendment Rights; or the absence of the good faith evidence at trial resulted from her Counsel's failure to exercise the skill, judgment or diligence of a reasonably competent attorney, amount to denial of Petitioner's right to effective assistance of counsel under the Sixth Amendment (discussed infra, Section IV).

It is well settled that for prosecutorial misconduct to constitute a due process violation, the government's acts must be so shocking and outrageous as to "violate the universal sense of justice." United States v. Ramirez, 710 F.2d 535 (9th Cir. 1983). United States v. Ryan, 548 F.2d 82, 789 (9th Circ. 1976); cert. den., 430 U.S. 965 (1977). Federal Courts have found

prosecutorial misconduct to meet this standard, inter alia, in the following situations:

(1) Where the government dismisses a previous indictment to deprive the the defendant of witnesses on a subsequent prosecution. United States v. Castillo-Felix, 539 F.2d 9 (9th Cir. 1976).

(2) Where the government increases the severity of alleged charges in response to exercise of constitutional or statutory rights. United States v. Hollywood Motor Car Co., Inc., 646 F.2d, 384 (9th Cir. 1979), cert. granted, reversed, 458 U.S. 263 (1980), on remand 682 F.2d 1352 (9th Cir. 1981);

(3) Where the prosecutor uses previous knowledge of a witness' criminal involvement to produce perjurous

testimony. U.S. v. Wong, 553 F.2d 756 (9th Cir. 1974), reversed 431 U.S. 174 (1975);

(4) Selective prosecution, United States v. Peskin, 527 F.2d 71 (5th Cir. 1975) cert. den. 426 U.S. 818 (1976);

(5) Vindictive prosecution. Jackson v. Walker, 585 F.2d 137 (3d Cir. 1978);

(6) Breach of the government's enforceable agreement with a defendant. Plesher v. United States, 720 F.2d 340 (6th Cir. 1983); and

(7) Deportation of witnesses favorable to the defense before the defense has an opportunity to interview them. United States v. Winnie Mae Mfg. Co., 451 F.Supp 642 C.D. Cal 1978).

In the instant case, the affidavits submitted by Petitioner in support of her motion for a new trial are also significant in their disclosure of prosecutorial misconduct. While not entirely precise and glaring, the affidavits must be read with the understanding that these witnesses have been threatened by the prosecution and were therefore afraid to divulge the testimony contained in the affidavits or the fact that coercion was present. As a result of this very effective coercion, the evidence of misconduct was merely brushed aside by the District Court; it alluded only to "vague allegations of 'pressure' to change testimony." (Order Denying Motion for a New Trial, p. 6).

In fact, the allegations were not vague, considering the circumstances, but rather were specifically and emphatically descriptive of the prosecution's heavy-handed tactics. It is for this reason the Petitioner will make the suggestion, infra, that if

this Court determines a new evidentiary hearing is required, that it be held in a different locale than Hawaii and under the supervision of prosecutors other than Mr. Yamamoto. Consider, for example, the statement of witness Pat McClain:

> "Regarding (Special Assistant U.S. Attorney) Mr. Yamamoto specifically, when I went to Hawaii for the Grand Jury I feel that he was very rude to me, he threatened me and intimidated me. I had seen an attorney briefly before leaving the mainland, primarily because I had never been in a courtroom before and I just wanted to know what the procedures were. He "held this against me," saying things such as if I weren't guilty, I wouldn't have needed to see an attorney. He said there was a conspiracy to commit fraud amongst the four of us and I was number two on the list, that there was no possible way he would consider granting me immunity and he would throw me in jail if I took the Fifth Amendment. A 15-minute interview with him truly destroyed my idea of American justice and the rights I always thought everyone had."

(McClain Declaration, Exhibit ", p.3.)

his is certainly not "vague," but rather a heartfelt and substantial indictment of the prosecutor's deplorable behavior. It is one thing to advise a person of being a potential

suspect but quite another to say that if the right to counsel is exercised, that person must be guilty. It has been said time and again that it is often the completely innocent person who is most in need of an attorney. Consider also, Carl Weisbrod's statement:

> When it was clear. . . that my testimony would not be in favor of the prosecution, I was pressured by threat to change my story. I refused. I later heard from Pat McClain and Clarence Steadman that they also received similar treatment. I am sure other witnesses were treated in a like manner . . . The prosecution started with an incorrect premise and pressured witnesses to testify to this premise requiring them to lie under oath.

(Affidavit of Carl Weisbrod, Exhibit "C p.1).

While Weisbrod may have had the strength not to alter his testimony, it cannot be said that other witnesses withstood the threats of Mr. Yamamoto. Clearly the above statement indicates that Mr. Weisbrod had personal knowledge of other threats which should be explored in a hearing out of the presence of the offending prosecutor.

The importance of a defendant's right to

have unfettered testimony of favorable witnesses has often been acknowledged by the courts. As the Court stated in Washington v. Texas, 338 U.S. 14, 19 (1967):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

The Court of Appeals, following Washington, supra, stated the proposition as follows:

> "The constitutional right of a criminal defendant to call witnesses in his defense mandates they be free to testify without fear of government retaliation."

United States v. Blackwell, 694 F.2d 1325, 1334 (D.C. Cir. 1982).

Prosecutorial threats of criminal prosecution to prevent favorable witnesses from testifying on a defendant's behalf, such as the threats used upon Pat McClain, have repeatedly supported findings of violations

of due process rights. See e.g., United States v. Morrison, 535 F.2d 223 (3rd Cir. 1976); United States v. Hammond, 598 F.2d 1008, 1012 (5th Cir. 1979); (prosecutor threatened "nothing but trouble" for witness if he testified); United States v. Mac Closkey, 682 F.2d 468 (4th Cir. 1982); (prosecutor telephoned witness' attorney with the reminder that if she testified she would be reindicted on dropped charges).

In Giglio v. U.S., 405 U.S. 150, 154-155 (1972), the prosecution's misconduct negatively affected the credibility of a witness' testimony; the Court reversed the conviction based on this denial of due process. The same problem is presented by the case at bar, since the intimidation of witnesses by the prosecution's threats must raise doubts as to the reliability of their testimony incriminating Petitioner. As co-workers of Petitioner who presumably

were well-acquainted with her methods of business, their testimony undoubtedly carried substantial weight with the jury. Therefore, their credibility is an essential issue, and evidence relating to that issue must be considered material.

The Ninth Circuit, citing Beck v. Washington, 369 U.S. 541 (1962), found that Dr. Monick had not provided evidence that say witness changed his or her testimony as a result of the prosecutor's threats. United States v. Monick, 9th Cir. (Nos. 83-1225 & 84-1189, decided December 27, 1984, mem at 3). The affidavits submitted, however, do indicate tangible effects of the threats. Take, for instance, the affidavit of witness Pat McClain:

> Mr. Yamamoto told me at the time of the Grand Jury hearing in 1982 that what we had done was illegal and I could be prosecuted i.e., "there was a conspiracy to commit fraud". Since that time, I have believed him but now I see again how the regulations can be interpreted as allowing the therapeutic

team concept. I felt very pressured by Mr. Yamamoto, and he made me feel very guilty, as if I were the worst sort of criminal. At the time I felt very threatened for something I didn't do, and I was afraid and became angry with Dr. Monick for apparently putting me in that spot. Neither Mr. Yamamoto nor Mr. Vierra were interested in what was really going on, they were only interested in a conviction.

and later:

Regarding Dr. Yamamoto specifically, when I went to Hawaii for the Grand Jury, I feel that he was very rude to me, he threatened me and intimidated me. I had seen an attorney briefly before leaving the mainland, primarily because I had never been in a courtroom before and I just wanted to know what the procedures were. He 'held this against me', saying things such as I weren't guilty, I wouldn't have needed to see an attorney. He said there was a conspiracy to commit fraud amongst the four of us and I was number two on the list, that there was no possible way he would consider granting me immunity and he would throw me in jail if I took the Fifth Amendment.

And, so witness Carl Weisbrod declared:

"The prosecution started with an incorrect premise and pressured witnesses to testify to this premise requiring them to lie under oath."
(Weisbrod Affidavit, Exhibit "C", at p.2.)

The foregoing, together with the absence of the witnesses testimony at trial regarding

Dr. Monick's good faith, raises a strong inference that testimony was changed.

In short, it is respectfully submitted that the outrageous misconduct of the prosecutor in intimidating and threatening witnesses denied Petitioner her right to due process.

IV. PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

On possible explanation for the absence of the critical good faith evidence at trial is ineffective assistance of counsel. In order to establish an ineffective assistance of counsel claim, the defendant must show that counsel's errors or omissions reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent attorney. In addition, the defendant must affirmatively establish prejudice as a result of the attorney's conduct. Strickland v. Washington, 104 S.Ct. 2052, 2063, 2065

(1984); United States v. Schaflander, 743 F.2d 714, 717-18 (9th Cir. 1984). Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceedings would have been different. Strickland, supra, 104 S. Ct. at 2068.

For the case at bar, the affidavits attached hereto reveal that witnesses existed who were willing to testify to Petitioner's good faith and lack of specific intent to defraud, but defense counsel never asked them any questions about this critical issue. As stated by witness Clarence Steadman:

> It should also be noted that at the time of the trial while I was a witness for the prosecution, I was very surprised that the government decided to prosecute Dr. Monick, and I was particularly surprised when it was not brought out by either side that I was always of the opinion that Dr. Monick always acted in good faith since I had told this to the prosecution on several occasions.

Clarence Steadman Affidavit, Exhibit "A" p,4.

The point is made even more strongly by witness Carl Weisbrod:

> I was called late in the trial and testified for several hours but was not asked by either side to bring out many important issues. My testimony was still damaging to the Prosecution's case but Dr. Monick's defense was wholly inadequate and she had no chance against a string of witnesses who lied under the pressure or for vindictive purposes. I know it could easily be proven that witnesses lied under oath.

And later:

> 1.) The prosecution started with an innocent premise and pressured witnesses to testify to this premise requiring them to lie under oath.
>
> 2) The defense did almost nothing to counteract these tactics.

These statements suffice to indicate that these witnesses were ready and willing to give favorable testimony on this critical issue, but the defense counsel never asked about these issues. It is the position of Petitioner that the conduct of her counsel fell far short of the skill, judgment, or diligence of a reasonably competent attorney.

These failings were to defendant's prejudice in that counsel failed to adduce available testimony which would have entitled Petitioner to a good faith instruction under United States v. Curry, supra. She prays the Court grant certiorari to remedy this denial of her Sixth Amendment Right to effective assistance of counsel.

V. CONCLUSION

For the foregoing reasons, it is respectfully submitted that certiorari should issue as a sound exercise of the Court's power of review. Only this Court can remedy the threatened deprivation of Dr. Monick's freedom, profession and good name occasioned by the grevious violations of her Fifth and Sixth Amendment Rights.

DATED: 2-19-85 Respectfully Submitted

Lloyd Clayton
Attorney for Petitioner

APPENDIX

EXHIBIT "A"

Court of Appeal's Memorandum

Affirming Lower Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	Nos. 83-1225
	)	84-1189
v.	)	
	)	D.C. No.
KERRY J. MONICK, M.D.,	)	CR 82-1009-1-HMF
	)	
Defendant-Appellant.	)	
	)	MEMORANDUM

Appeal from the United States District Court
For the District of Hawaii
The Honorable Harold M. Fong, Presiding
Argued and Submitted November 7, 1984

Before: HUG, TANG, and SCHROEDER,
Circuit Judges

Kerry J. Monick, M.D., (the "appellant") appeals her conviction of 80 counts of Medicaid fraud under 42 U.S.C. § 1396h (1983) and 80 counts of mail fraud under 18 U.S.C. § 1341 (Supp. 1984). We affirm the judgment of the district court.

FACTS

The appellant was charged with making

Medicaid claims for personally rendered psychiatric services when she, in fact, had not provided such services. At trial, Bernard Ho, Vice President ofthe Hawaii Medical Service Association, ("HMSA"), testified that, on June 15, 1977, he informed the appellant that she must personally render claimed-for services. Thereafter, the appellant made numerous Medicaid claims for services that she had not personally provided. Testimony from the appellant's clerical staff tended to establish that the appellant initiated a system of duplicate appointment books in order to substantiate her false claims.

Judgment was entered against the appellant on September 6, 1983.

DISCUSSION

I. Motion for a New Trial.

A. Nondisclosure of Exculpatory Evidence

The appellant claims that the district court abused its discretion by refusing to grant her motion for a new trial based on the prosecutor's failure to disclose exculpatory evidence. Nondisclosure of exculpatory evidence violates due process if (a) the nondisclosed evidence is material, (b) its content is favorable to the defendant, and (c) such exculpatory evidence has not been included in any report provided to the defendant. United States v. Van Brandy, 726 F.2d 548, 551 (9th Cir. 1984).

In the present case, the alleged nondisclosed evidence amounted to statements made by witnesses to the prosecutor that the appellant had submitted the Medicaid claims in "good faith." The district court held that this nondisclosed evidence was immaterial. It

found that the combined adverse testimony of eleven witnesses contained sufficient evidence for a jury to find the defendant guilty beyond a reasonable doubt. In addition, this "new evidence" did not contradict the witnesses' trial testimony, but merely consisted of legal conclusions that the appellant had acted in good faith. The district court did not abuse its discretion in refusing to grant the appellant's motion for a new trial on the basis of nondisclosure of exculpatory evidence.

B. Prosecutorial Misconduct

The appellant claims that a new trial is warranted because of prosecutorial misconduct. In order to constitute a due process violation, prosecutorial misconduct must be "so shocking and so outrageous as to violate the universal sense of justice . . . ." United States v. Ryan, 548 F.2d 782, 789

(9th Cir. 1976), cert. denied, 430 U.S. 965 (1977)).

The alleged misconduct consists of the above-discussed failure to disclose exculpatory evidence and the prosecutor's threats directed to prospective witnesses. The prosecutor's failure to disclose exculpatory evidence was not sufficiently flagrant to amount to a due process violation. In addition, the appellant has not provided evidence that any witness changed his or her testimony as a result of the prosecutor's threats. See Beck v. Washington, 369 U.S. 541, 555 (1962) (although the prosecutor threatened a grand jury witness, there was no constitutional violation where it appears that the threats had no effect on the witness's testimony). The district court properly held that the

prosecutor's conduct did not amount to a due process violation.

II. Introduction of Prejudicial and Irrelevant Testimony

The appellant claims that the prosecution elicited prejudicial and irrelevant opinion testimony from the appellant's clerical staff. Since the appellant's attorney did not object to the admission of this testimony, we must determine whether the district court committed such plain error so as to justify review. If the court plainly erred, we must then determine whether the error was harmless. Fed. R. Crim. P. 52(b); United States v. Halbert, 712 F.2d 388, 389 (9th Cir. 1983), cert. denied, ___ U.S. ___, 104 S. Ct. 997 (1984).

At trial, some members of the appellant's staff stated their opinions that they were uncomfortable with the appellant's billing practices. However, they also described the

billing practices in some detail. Given the factual foundations for these opinions, their admission did not constitute plain error. See United States v. Thompson, 708 F.2d 1294, 1299 (8th Cir. 1983). Even if the introduction of this testimony were plain error, there was independent evidence, including the appellant's office practices and other testimony, that rendered any error harmless beyond a reasonable doubt.

III. Good Faith Instruction

The appellant claims that, although a request for an instruction on the defense of good faith was not made by her counsel, the district court plainly erred in failing to issue such an instruction. Other circuits have held in mail fraud cases that an instruction that the defendant must act with specific intent to defraud need not be

supplemented with an instruction that the defendant acted in good faith. See United States v. Wilkinson, 460 F.2d 725, 729 (5th Cir. 1972); United States v. Hamlin, 432 F.2d 905, 909 (8th Cir. 1970); New England Enterprises, Inc. v. United States, 400 F.2d 58, 71 (1st Cir. 1968), cert. denied, 393 U.S. 1036 (1969). No circuit has held that a court must give a good faith instruction when none is proffered by the defendant. In this case, the appellant has provided neither the trial court nor this court with the language of the instruction he argues the district court should have given. The district court's failure to instruct the jury in the defense of good faith did not constitute plain error.

IV. Ineffective Assistance of Counsel

The appellant claims that she was denied effective assistance of counsel. In order to

establish an ineffective assistance of counsel claim, the defendant must show that counsel's errors or omissions reflect a failure to exercise the skill, judgment, or diligence of a reasonably competent attorney. In addition, the defendant must affirmatively establish prejudice as a result of the attorney's conduct. Strickland v. Washington, 104 S. Ct. 2052, 2063, 2065 (1984); United States v. Schaflander, 743 F.2d 714, 717-18 (9th Cir. 1984). Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, 104 S. Ct. at 2068.

The appellant sets forth several alleged errors by her defense counsel at trial. First, the appellant claims that the defense counsel failed to interview the Government's

primary witnesses. Failure to interview potential witnesses can constitute ineffective assistance of counsel. Hines v. Enomoto, 658 F.2d 667, 676 (9th Cir. 1981). However, the defense counsel was provided with statements of all government witnesses at least 10 days prior to the commencement of the trial. Therefore, the appellant has not established any prejudice that resulted from this omission.

Second, the appellant claims that the defense counsel failed to object to the admission of considerable irrelevant and prejudicial testimony. However, the trial record is replete with instances where the defense counsel made evidentiary objections. In each instance where the defense counsel did not raise any objection, he could have legitimately thought that an objection would

draw further attention to the irrelevant testimony. See United States v. Eaglin, 571 F.2d 1069, 1087 (9th Cir. 1977), cert. denied, 435 U.S. 906 (1978). In addition, the appellant has not shown how the defense counsel's errors prejudiced the defense. See United States v. Gibson, 690 F.2d 697, 704 (9th Cir. 1982), cert. denied, 460 U.S. 1046 (1983).

Finally, the appellant claims that the defense counsel erred in failing to impeach Bernard Ho's testimony that he had informed the appellant that her billing practices were unacceptable. The appellant claims that a memorandum written by Ho several days after he met with the appellant contradicts this testimony. However, the memorandum did not directly contradict Ho's testimony, but merely reflected uncertainty about HMSA

policy concerning Medicaid claims for services rendered by allied personnel. Therefore, the defense counsel's failure to impeach Ho's testimony was not wholly unreasonable.

The defense counsel's conduct at trial did not reflect a failure to exercise the skill of a reasonably competent attorney. Even if the defense counsel's conduct were unreasonable, it is not reasonably probable that, but for the defense counsel's errors, the outcome of the case would have been different.

V. Pre-indictment Delay

Delay prior to the issuance of the indictment may give rise to a due process claim. United States v. Lovasco, 431 U.S. 783, 788-89 (1977). In order to establish a due process violation, the defendant must show that the delay caused actual prejudice.

If prejudice is shown, the court must consider the length of and reason for the delay. United States v. Kidd, 734 F.2d 409, 412-13 (9th Cir. 1984).

In the present case, the indictment was issued one month before the 5-year statute of limitations would have expired. The appellant's primary basis for claiming prejudice is the death of a potential witness, Dr. R. W. Millar, in March of 1981. A showing that a witness has been lost due to pre-indictment delay can suggest actual prejudice; however, a defendant must identify the witness and relate the substance of his or her testimony and how the absence of the evidence prejudiced the defense. United States v. Mills, 641 F.2d 785, 788 (9th Cir.), cert. denied, 454 U.S. 902 (1981).

Dr. Millar was the Director of Medical

Care Administration Services in Hawaii. The appellant claims that Dr. Millar's testimony was crucial because he authored Memo 79-02, dated February 5, 1979, which informed psychiatrists that they could not bill Medicaid for services rendered by allied personnel. According to the appellant, Dr. Millar would have testified about HMSA policies and regulations during the period in which the appellant had billed Medicaid for services that she had not personally provided.

In United States v. Mays, 549 F.2d 670 (9th Cir. 1977), three potential witnesses who were intimately involved with the mail fraud scheme at issue died prior to the issuance of the indictment. We recognized the defendant's difficult task of demonstrating how the witnesses would have contributed to the

defense. Id. at 677 n.12. Nonetheless, we held that the potential witnesses' "general involvement in the case was insufficient to show actual prejudice." Id. at 679-80. The same is true with respect to Dr. Millar's potential testimony. We can only speculate whether the content of Dr. Millar's testimony would have been favorable to the appellant's case. The content of his memo suggests otherwise. The appellant has failed to establish actual prejudice as a result of Dr. Millar's death.

The appellant claims that witnesses' memories have been dimmed and that certain of her files have been destroyed because of the delay. A claim that witnesses' memories have dimmed without proof of impairment does not constitute actual prejudice. Mills, 641 F.2d at 789. Likewise, the appellant has

failed to support her claim that the loss of her files resulted in actual prejudice. See Mays, 549 F.2d at 673 n.1.

Because the appellant has failed to establish actual prejudice from the pre-indictment delay, we must deny her due process claim.

VI. Taint Hearing

Finally, the appellant claims that the district court improperly denied her motion for a taint hearing. The appellant claims that the testimony of two witnesses, James Alexander and Mark Kokobun, was the fruit of files which were illegally seized from the appellant's office. In order to obtain a taint hearing, a defendant has the initial burden of establishing a factual nexus between the illegal search and the challenged evidence. United States v. Kandik, 633 F.2d

1334, 1335 (9th Cir. 1980). The appellant has failed to offer any facts that establish a connection between the illegally seized files and the challenged testimony. The appellant's claim is without merit.[1/]

The judgment of the district court is AFFIRMED.*

1/ The appellant claims that her conviction was not supported by substantial evidence. This claim is without merit.

*The panel has concluded that the issues presented by this appeal do not meet the standards set by Rule 21 of the Rules of this Court for disposition by written opinion. Accordingly, it is ordered that disposition be by memorandum, forgoing publication in the Federal Reporter, and that this memorandum may not be cited to or by the courts of this circuit, save as provided in Rule 21(c).

EXHIBIT "B"

Order Denying Motion

For a New Trial

B1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA, Plaintiff, v. KERRY J. MONICK, Defendant.	)	CR. NO. 82-01009

ORDER DENYING MOTION FOR A NEW TRIAL

The court having considered defendant's Motion for a New Trial, having reviewed the memoranda filed in support and in opposition thereto, and being fully apprised of the premises therein, finds as follows:

Pursuant to the stay of appeal filed on April 6, 1984 by the United States Court of Appeals for the Ninth Circuit, this court has jurisdiction over the defendant's Motion for a New Trial filed on April 3, 1984.

The defendant moves for a new trial on

the basis of prosecutorial misconduct and newly discovered evidence. The defendant argues that the statements she presents of three witnesses called by the prosecution at trial, Clarence Steadman, Pat McClain, and Carl Weisbrod, constitute newly discovered evidence which requires that she be granted a new trial. Further, the defendant argues that the prosecution failed to disclose the substance of those statements, thereby suppressing exculpatory evidence and depriving the defendant of a fair trial.

NEWLY DISCOVERED EVIDENCE

In order to prevail on a motion for a new trial based on newly discovered evidence, the movant must meet five requirements: the evidence must in fact be newly discovered; the motion must allege facts from which the court can infer diligence on the part of the

movant in attempting to secure the evidence; the evidence must be more than merely cumulative or impeaching; it must be material to the issues involved; and it must be evidence which would probably produce an acquittal at a new trial. See United States v. Kenny, 645 F.2d 1323, 1343 (9th Cir.), cert. denied, 452 U.S. 920 (1981), cert. denied, 454 U.S. 828 (1981). Further, the decision whether to grant a motion for a new trial falls within the sound discretion of the trial judge. See id.; United States v. Brasher, 607 F.2d 840 (9th Cir. 1979), cert. denied, 445 U.S. 942 (198X).

The defendant argues that the affidavits of Clarence Steadman, Pat McClain, and Carl Weisbrod constitute newly discovered evidence. Mr. Steadman's affidavit discusses a "team concept" wherein the defendant supervised

Steadman. These statements contradict Steadman's testimony at trial that he is a superior therapist to the defendant, that defendant did not attend group therapy sessions on a regular basis, and that defendant signed Medicaid forms for patients treated by Steadman solely because Steadman could not make claims for payment on the Hawaii Medicaid Program. Thus, Steadman's present testimony is merely evidence which could have been produced at trial through cross-examination. Further, Steadman's affidavit presents his opinion that defendant did not intend to commit fraud, and Steadman's objections to the prosecution of defendant. Those statements are irrelevant to the issue of defendant's guilt, and would not be admissible at trial.

The court finds that, even if the

information contained in Steadman's affidavit were presented at trial, there would still be sufficient evidence to find the defendant guilty beyond a reasonable doubt.

Ms. McClain's affidavit also presents evidence which could have been brought out in cross-examination. She states that, as she now reads the governing state and federal regulations, defendant's actions were in compliance with those regulations. This conflicts with McClain's testimony at trial that a Medicaid claim cannot be submitted unless the physician submitting the claim has personally seen the patient. McClain's affidavit also attempts to enlarge her testimony at trial, by justifying defendant's practice of concealment of the actual treating therapist's name, with falsified notes and appointment books. Finally, McClain's

affidavit presents her opinion that defendant did not intend to commit fraud, which is not relevant and would not be admissible at trial.

Again, the court finds that, even if the information contained in McClain's affidavit were presented at trial, there would still be sufficient evidence to find the defendant guilty beyond a reasonable doubt.

Mr. Weisbrod's affidavit discusses the origin of the duplicate appointment books, and the possibility of prosecutorial misconduct (see infra). The affidavit merely reiterates Weisbrod's testimony at trial; thus it constitutes mere cumulative evidence. Further, Weisbrod's affidavit presents his personal opinions about defendant's intent, which is not relevant and would not be admissible at trial.

The court finds, once again, that, even

if the information contained in Weisbrod's affidavit were presented at trial, there would still be sufficient evidence to find the defendant guilty beyond a reasonable doubt.

The evidence presented by defendant is not newly discovered. Further, the evidence presented could have been elicited in cross-examination at trial. It appears that defense counsel was not sufficiently diligent in obtaining the evidence.

The three affidavits attempt to show defendant's lack of criminal intent. However, insofar as the affidavits present affiants' opinions, they would be inadmissible at trial, pursuant to Rule 701 of the Federal Rules of Evidence. Because the affidavits present opinions, they are not material to the issues involved in determination of defendant's guilt.

Further, because the opinions presented in the affidavits would not be admissible at trial, they probably would not produce an acquittal at a new trial. Even if the prosecution had not presented the testimony of Steadman, McClain, and Weisbrod at trial, the combined testimony of Mr. Bernard Ho, Ms. Karen Rillo, Ms. Myra Hirobara, Ms. Lyrio Tiburcio, Ms. Cindy Quan, Ms. Loretta Ware, Mr. Daniel Monick, Ms. Bess Phillips, Lt. James Isobe of the Honolulu Police Department, Mr. Henry Pikini of the Halawa High Security Facility, and Mr. Mark Kokubun clearly contained sufficient evidence for a jury to find the defendant guilty beyond a reasonable doubt.

PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor intentionally suppressed exculpatory evidence,

thereby depriving the defendant of a fair trial. Specifically, she argues that the prosecution failed to disclose the contents of the affidavits of Steadman, McClain, and Weisbrod, which show their personal opinions as to defendant's intent.

In addition to the affiants' opinions about defendant's intent to commit fraud, Mr. Weisbrod's affidavit states further that, despite prosecution pressure to change his testimony to make it more favorable to the prosecution, he refused to do so. Mr. Weisbrod's affidavit does not detail this alleged misconduct.

The United States Supreme Court held, in United States v. Agurs, 427 U.S. 97 (1976) that the government's failure to disclose evidence constitutes constitutional error only if the undisclosed evidence creates

reasonable doubt as to the defendant's guilt which did not otherwise exist. The allegation of misconduct consists of the prosecution's failure to disclose personal opinions of witnesses called by the prosecution at trial, and vague allegations of "pressure" to change testimony, which did not cause the witness to change his testimony. Absent any more specific or substantial allegations of suppression, the court finds that the alleged nondisclosure does not meet the materiality requirement of United States v. Agurs.

CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that defendant's Motion for a New Trial be, and the same is, DENIED.

DATED: Honolulu, Hawaii, May 21, 1984

B11

/s/ Harold M. Fong
UNITED STATES DISTRICT JUDGE

UNITED STATES OF AMERICA vs. KERRY J. MONICK
CR. NO. 82-01009
ORDER DENYING MOTION FOR A NEW TRIAL

EXHIBIT "C"

Affidavit of Clarence Steadman

DECLARATION OF CLARENCE STEADMAN

I, Clarence Steadman, do hereby declare:

I was a witness in a criminal proceeding against Dr. Kerry Monick with regards to an alleged Medicaid Fraud case.

I joined Dr. Monick's therapeutic team in 1977. My initial duties consisted of seeing private patients on a one-to-one basis and some psychological testing. Shortly after joining the therapeutic team, group therapy was initiated as one of our approaches of helping people with psychological problems. For the services I rendered I was paid by various insurance companies (i.e., CHAMPUS, MEDICAID, etc.), through the clinic and at no time did I ever receive a set salary.

I was aware of the billing process to the extent that I knew I had to submit progress notes on each patient after I

evaluated them. My patient progress notes were then turned over to our billing secretary, Pat McClain, for typing and then were brought to Dr. Monick for review. After review by Dr. Monick, the progress notes were then turned over to the billing secretary and the appropriate insurance company would be billed according to time spent with the patient as reflected in the progress notes. When I saw patients as their primary therapist under Dr. Monick's supervision, I would receive between 70-75% of the monies paid by the insurance companies or by the patients themselves, and the clinic would receive approximately 25-30%, or the remainder. Group therapy started sometime within the first year of my joining the clinic for which I would receive 50% of the monies paid from either the insurance

companies or the patients. Dr. Monick would receive the remaining 50% as she was my supervisor.

In January of 1980 I left the clinic when Dr. Monick was my supervisor for the following reasons:

1. My parents who reside back east wanted me to spend some time with them, and my father was hospitalized.

2. Dr. Monick stated she could no longer supervise me as a therapist.

After visiting my parents I took a job as administrator of a program in San Diego assisting the mentally retarded. After my arrival in San Diego I was visited at my home at around 10:30 p.m. by a Mr. Clyde Vierra of the Medicaid Fraud Unit from Hawaii. He explained to me that he had concern over the billing practices of the

clinic, where I was a former therapist, and that my supervisor, Dr. Kerry Monick, was their (the Medicaid Fraud Unit) primary target of this investigation. He also stated to me that their biggest area of concern was when she was absent from the office due to a vacation in Egypt and another period of time due to an automobile accident. I would like to say that I stated to Mr. Vierra and Mr. Yamamoto that even when Dr. Monick was absent from work (whether from vacation or illness) that she always left a covering physician in her place in case of an emergency or in the case hospitalization was required. I was never left unsupervised. In fact, as I recall, during Dr. Monick's vacation to Egypt, Dr. Tony Dee of Honolulu, Hawaii and another physician from Queen's Hospital could be reached through the physician's exchange at

all times. Also, during the time she was supposedly out of the office after her accident and surgical operation, I only recall her missing one or two full days of work. I might add that she stayed in constant communication by phone or by merely dropping in the office. As I stated before, there would always be a covering physician which any member of the therapeutic team would be able to reach simply by contacting the physician's exchange. I felt that no member of the therapeutic team had done anything illegal with regard to our patient billing procedure. With the tremendous amount of good response the therapeutic team received from the patients', without a doubt, I knew we were giving the absolute best of care to our patients.

I explained to Mr. Vierra and Mr.

George Yamamoto, who was the special prosecutor for the Medicaid Fraud Unit in Hawaii, that at no time did Dr. Monick or any member of the therapeutic team attempt to defraud, rip-off, steal from, or in any way act in bad faith towards any patient or insurance company or the Medicaid system that had been billed for our services, in my opinion. In fact, I stated in my conversation with Mr. Vierra and/or Mr. Yamamoto that at no time did any member of our therapeutic team act in any other manner that would have been contrary to our good faith approach as a team and that I didn't really understand what this intense investigation was all about. It should also be noted that I objected to the prosecution of Dr. Monick to Mr. Vierra and Mr. Yamamoto before I testified in front of the

Oahu grand jury and at her trial. I also stated to Mr. Vierra and Mr. Yamamoto that I didn't really understand how they could particularly pinpoint any of the billing since our secretarial staff left much to be desired and that I was sure the billing process would more than likely reflect the chaotic state our secretarial staff seemed to be in most of the time.

It should also be noted that at the time of the trial while I was a witness for the prosecution, I was very surprised that the government decided to prosecute Dr. Monick, and I was particularly surprised when it was not brought out by either side that I was always of the opinion that Dr. Monick always acted in good faith since I had told this to the prosecution on several occasions.

I declare under penalty of perjury that the forgoing declaration is true and correct.

/s/ Clarence G. Steadman
Clarence Steadman

State of California

County of San Diego

March 9th, 1984

Marie Dominguez-Notary

(seal)

EXHIBIT "D"

Affidavit of Pat McClain

March 19, 1984

I worked at Psychiatric and Counseling Associates with Dr. Monick and other doctors and psychotherapists from 1976 to about the middle of 1978. Originally I was the only clerical staff and the office members consisted of Carl Weisbrod and Dr. Monick, with another part-time psychotherapist (Vince O'Neill).

The practice grew very quickly and my workload easily doubled within the first year. This was somewhat stressful to me because of the many demands being made of me by all of the therapists and I just didn't have as much time for personal contact with the patients as I had previously - and the personal contact was the area that I enjoyed most. Nevertheless, I felt -- and still do -- that this was one of the most satisfying and personally

rewarding periods of my life. The atmosphere was very positive and I felt a great satisfaction in my work which contributed to the patients' improvement and recovery. At one point we had to make a policy that the patients could not come in until one hour before their appointment and they would have to leave immediately afterwards -- this was mainly because the caseload of indigents rose after we began treating more and more patients who were discharged from the Salvation Army Alcohol Treatment Facility. Although this affiliation began with Dr. Monick and Vince O'Neil, it grew much bigger after Clarence Steadman joined the group. He worked at ATF which was a residential treatment facility and was in charge of aftercare. In this capacity he referred many patients

to our office for treatment. Those for whom he had been primary therapist at ATF were often able to take the opportunity of continuing to see Clarence Steadman after they were discharged. This helped with continuity of care and maybe improved our recovery rate which was unusually high, especially for alcohol and drug-addicted patients. There was no group therapy during the time I worked at the clinic. The main problems we had with these patients and the reason many other physicians would not treat them was their unreliability. This included their Medicaid eligibility requirements and also regularly keeping appointments. The office was totally patient oriented and money was never the primary motivation. Thus, there was no quota or other policy

discrimination against Medicaid even though the payment from Medicaid was only about 1/2 to 1/3 of the doctors' fees.

The regulations are important in this case. There is some confusion in interpreting them as Dr. Monick and the therapeutic team were following the written State and Federal regulations as I now read them. Mr. Yamamoto told me at the time of the Grand Jury hearing in 1982 that what we had done was illegal and I could be prosecuted, i.e., "there was a conspiracy to commit fraud." Since that time, I have believed him but now I see again how the regulations can be interpreted as allowing the therapeutic team concept. I felt very pressured by Mr. Yamamoto, and he made me feel very guilty, as if I were the worst sort of criminal. At the time I felt very

threatened for something I didn't do, and I was afraid and became angry with Dr. Monick for apparently putting me in that spot. Neither Mr. Yamamoto nor Mr. Vierra were interested in what was really going on, they were only interested in a conviction. I don't think the thought ever occurred to any of us that there was any sort of "fraud" involved -- we were just too involved and busy with taking care of patients and paperwork. I think the 'coverup' alluded to by the two appointment books was a transient and naive idea to comply with Mr. Ho's requests while still taking care of our patients.

As the staff grew, so did the personnel problems. One was Dr. Wright, he tended to take up all of our time with his different problems and it made my work very difficult.

He seemed anxious and hostile and unable to adjust harmoniously even though we all tried to work with him. Dr. Wright's philosophy simply didn't fit in with the rest of the clinic -- he was very money oriented, he did not at all like to be involved with Medicaid patients. After a group decision, Dr. Monick asked him to leave.

Regarding Karen Rillo, I have just read her testimony at trial and I disagree with it completely -- quite frankly, I believe most of it is an out and out lie. Karen was very unhappy at the clinic, patients were "weird" -- she just didn't fit in. She lied when she was working there, that was the main reason that the decision had been made to fire her at about the same time that she quit.

As far as office procedures were concerned, I really don't recall why the system was developed for typing the handwritten notes, I think it was the same sort of thing as the appointment books -- just to meet Mr. Ho's requirements and still treat the patients -- again, I don't think the thought of "fraud" ever occurred to any of us. I do not recall being instructed to destroy the notes nor do I recall instructing anyone else to do so; as I recall the stack of handwritten notes was kept in the bottom drawer of the file cabinet.

As far as supervision is concerned, I know Dr. Monick saw a great deal of both Clarence and Carl, during which time she would tell me of her discussions about patients. She was almost never away from the office and when she was, she was always

in touch by phone. On the rare occasions when she was away, there was another physician covering for her through the Physician's Exchange. As I mentioned at the trial, I received psychiatric services from Dr. Monick and other psychiatrists, and I have also worked for other psychiatrists. I know by the nature of the therapy and customary practice that it would be inappropriate to have a third person sit in all the time on a confidential one-to-one therapy basis. Maybe this is the problem with "direction of a physician" in the Federal Rules as opposed to "direct supervision" which Mr. Ho proposed in his memo. When Mr. Ho came to audit the charts in our office, in my opinion it was the first time he had ever seen psychiatrists' notes.

All this trial and conviction has been started on the wrong premise. I told Mr. Vierra and Mr. Yamamoto from the beginning that I knew Dr. Monick was acting in good faith. I know I was, and I know the community really appreciated our services. I believe that Dr. Monick lost more money by being a Medicaid provider and accepting Medicaid payments than she gained by supervising.

Regarding Mr. Yamamoto specifically, when I went to Hawaii for the Grand Jury, I feel that he was very rude to me, he threatened me and intimidated me. I had seen an attorney briefly before leaving the mainland, primarily because I had never been in a courtroom before and I just wanted to know what the procedures were. He "held this against me", saying

things such as if I weren't guilty, I wouldn't have needed to see an attorney. He said there was a conspiracy to commit fraud amongst the four of us and I was number two on the list, that there was no possible way he would consider granting me immunity and he would throw me in jail if I took the Fifth Amendment. A 15 minute interview with him truly destroyed my idea of American justice and the rights I always thought everyone had.

I declare under penalty of perjury the foregoing to be true and correct.

/s/ Pat McClain
Pat McClain

State of California)
) ss.
County of Sonoma)

On March 20, 1984 before me, the undersigned, a Notary Public in and for said State, personally appeared PAT McCLAIN, personally known to me (or

proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument and acknowledged to me that she executed the same.

WITNESS my hand and official seal.

/s/ Linda Galarneaux
Linda Galarneaux
Notary Public - California
Principal Office in Sonoma County
My Commission Expires May 31, 1984

(seal)

EXHIBIT "E"

Affidavit of Carl Weisbrod

October 31, 1983

TO WHOM IT MAY CONCERN:

RE: United States of America, Plaintiff
vs.
Kerry J. Monick, M.D., Defendant
CR # 82-01009

I am Carl Weisbrod.

I am willing (and have testified) to swear to the accuracy of the following facts to the best of my recollection.

I was the originator of Psychiatric and Counseling Associates. I was completely involved in all aspects of the clinic from its inception until I separated in 1979. I was involved in all decisions along with other partners/therapists especially Kerry Monick, Clarence Steadman and Peter Bianchi, our paid administrator during a period from 1978-1979. I also spent several hours in meetings with members of the Medicaid Fraud Unit and was informed in detail of their

contentions. These contentions were largely inaccurate or completely false. When it was clear to these officials that my testimony would not be in favor of the prosecution, I was pressured by threat to change my story. I refused. I later heard from Pat McClain and Clarence Steadman that they also received similar treatment. I am sure other witnesses were treated in a like manner. I was called late in the trial and testified for several hours but was not asked by either side to bring out many important issues. My testimony was still damaging to the Prosecution's case but Dr. Monick's defense was wholly inadequate and she had no chance against a string of witnesses who lied under pressure or for vindictive purposes. I know it could easily be proven that witnesses lied under oath.

For example: Here are the facts surrounding the TWO APPOINTMENT BOOKS ISSUE. When Mr. Ho did the HMSA audit in our office in 6/77, we had one appointment book for the clinic. I was the major contact with him during the audit and received his criticisms and policy instructions. He suggested to me several times we needed to "clean up our record-keeping act". He made as a major point that he did not like our appointment book because it was filled with personal notes and illegible scribbling made by individual therapists. He informed me that an insurance company audit considered the appointment book to be a major source of information and must be accurate. Our book was not accurate because therapists

kept personal notes on appointments, change of appointments, and rescheduled appointments in their offices. I decided that, based on Mr. Ho's instructions, we needed an accurate schedule of appointments in an appointment book format. Hence the second appointment book. Dr. Monick was not involved except to agree with my recommendation along with the other therapists. To this day in my private practice, I keep two appointment books for reasons of accurate record keeping, not as an attempt to defraud.

As I read the complete trial transcript I could hardly believe that the appointment book issue could have been so manipulated into evidence of fraud when the original idea was actually suggested by HMSA's own representative. This is, however, an example of the way many issues were manipulated to

falsely indicate guilt. The fraud unit was aware of the actual facts surrounding the appointment book issue but chose to ignore the information I gave them. Of course, Mr. Ho and other witnesses lied in their testimony. I understand his memos, which were not brought into evidence at the trial, but were in the motion for a new trial, strongly suggest he made a perjurious statement at trial.

In summary:

1) The prosecution started with an incorrect premise and pressured witnesses to testify to this premise requiring them to lie under oath.

2) The defense did almost nothing to counteract these tactics.

Signed,

/s/ Carl Weisbrod
Carl Weisbrod

Office-Supreme Court, U.S.
FILED
JUL 10 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1564

In the Supreme Court of the United States

OCTOBER TERM, 1985

KERRY J. MONICK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's motion for a new trial based on alleged prosecutorial misconduct and newly discovered evidence.

2. Whether petitioner was denied effective assistance of counsel at trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-10) and the order of the district court denying the motion for a new trial (Pet. App. B 1-6) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1984. The petition for a writ of certiorari was filed on February 26, 1985, and is therefore out of time under Rule 20 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner was convicted on 80 counts of Medicaid fraud, in violation of 42 U.S.C. 1396h, and 80 counts of mail fraud, in violation of 18 U.S.C. 1341. The district court subsequently granted in part petitioner's

motion under 28 U.S.C. 2255 to vacate or set aside sentence and her motion under Fed. R. Crim. P. 35 to reduce sentence. The court set aside her convictions on 32 counts, and sentenced petitioner to suspended concurrent terms of two years' imprisonment, three years' probation, and a total fine of $5,000 on Counts 80 and 160. As to all remaining counts, petitioner was sentenced to serve concurrent terms of three years' probation.

1. The evidence showed that petitioner, a psychiatrist, made numerous Medicaid claims for personally rendered psychiatric services when she had not in fact provided such services, and after she had been informed by an official responsible for administering the Hawaii Medicaid plan that she must personally render claimed-for services. The evidence also showed that petitioner developed a system of duplicate appointment books to substantiate her false claims. Pet. App. A 1-2.

2. a. Following her conviction, petitioner moved in the district court for a new trial, alleging prosecutorial misconduct and newly discovered evidence (Pet. App. B 1). Petitioner presented to the trial court the affidavits of three prosecution witnesses, Steadman, McClain, and Weisbrod, which she contended constituted newly discovered evidence.[1] She claimed further that the prosecutor was aware of the substance of the affiants' statements but failed to disclose that information to her. Petitioner also asserted that the prosecutor exerted pressure on the affiants to change their testimony. The district court described these affidavits as follows (*id.* at 2-4):

> Mr. Steadman's affidavit discusses a "team concept" wherein [petitioner] supervised Steadman. These statements contradict Steadman's testimony at trial that he

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[1]The affidavits are reproduced as appendices C, D, and E to the petition for a writ of certiorari.

> is a superior therapist to the [petitioner], that [petitioner] did not attend group therapy sessions on a regular basis, and that [petitioner] signed Medicaid forms for patients treated by Steadman solely because Steadman could not make claims for payment on the Hawaii Medicaid Program. * * * Further, Steadman's affidavit presents his opinion that [petitioner] did not intend to commit fraud, and Steadman's objections to the prosecution of [petitioner]. * * *
>
> * * * * *
>
> Ms. McClain's affidavit * * * states that, as she now reads the governing state and federal regulations, [petitioner's] actions were in compliance with those regulations. This conflicts with McClain's testimony at trial that a Medicaid claim cannot be submitted unless the physician submitting the claim has personally seen the patient. McClain's affidavit also attempts to enlarge her testimony at trial, by justifying [petitioner's] practice of concealment of the actual treating therapist's name, with falsified notes and appointment books. Finally, McClain's affidavit presents her opinion that [petitioner] did not intend to commit fraud * * *.
>
> * * * * *
>
> Mr. Weisbrod's affidavit discusses the origin of the duplicate appointment books, and the possibility of prosecutorial misconduct * * *. The affidavit merely reiterates Weisbrod's testimony at trial * * *. Further, Weisbrod's affidavit presents his personal opinions about [petitioner's] intent * * *.

b. The district court denied petitioner's motion for a new trial (Pet. App. B 1-6). The court ruled that the evidence in the affidavits could not be characterized as "newly discovered" because it could have been elicited on cross-examination at trial (*id.* at 4). The court stated that to the

extent the affidavits attempted to show petitioner's lack of criminal intent, they merely presented the affiants' opinions and would therefore be immaterial and inadmissible at trial (*id.* at 4-5). The district court further noted that 11 other witnesses had testified against petitioner at trial, and accordingly concluded that the evidence in the affidavits was not sufficiently material to warrant a new trial. The district court also rejected petitioner's claim of prosecutorial misconduct, finding that it consisted only of the assertion that the prosecution failed to disclose personal opinions of witnesses and of "vague allegations of 'pressure' to change testimony" (*id.* at 6).

3. The court of appeals affirmed petitioner's convictions. The court held that the district court "did not abuse its discretion in refusing to grant [petitioner's] motion for a new trial on the basis of nondisclosure of exculpatory evidence" (Pet. App. A 3). The court of appeals also upheld the district court's ruling that "the prosecutor's conduct did not amount to a due process violation" (*ibid.*), noting that petitioner had failed to present any evidence that any witness changed his testimony in response to threats by the prosecutor (*ibid.*).

In addition, the court of appeals found no merit in petitioner's claim that she was denied the effective assistance of counsel (Pet. App. A 5).[2] Relying on this Court's decision in *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), the court of appeals concluded (Pet. App. A 7) that "counsel's conduct at trial did not reflect a failure to exercise the skill of a reasonably competent attorney." The court also noted that petitioner had not shown "how the defense counsel's errors prejudiced the defense" (*id.* at 6) and accordingly

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[2]The court below also rejected petitioner's claims regarding, inter alia, pre-indictment delay and certain evidentiary rulings by the trial court.

ruled that, under *Strickland*, petitioner was not entitled to relief because "[e]ven if the defense counsel's conduct were unreasonable, it is not reasonably probable that, but for the defense counsel's errors, the outcome of the case would have been different" (*id.* at 7).

In particular, the court of appeals rejected petitioner's claim that her trial counsel was ineffective because he failed to interview government witnesses; the court of appeals noted that since "defense counsel was provided with statements of all government witnesses at least 10 days prior to the commencement of the trial" (Pet. App. A 6), any failure to conduct interviews was not prejudicial. The court also rejected petitioner's contention that counsel's failure to object to the admission of irrelevant and prejudicial testimony rendered his assistance ineffective; the court noted that "the trial record is replete with instances where the defense counsel made evidentiary objections" and that where counsel did not object he "could have legitimately thought that an objection would draw further attention to the irrelevant testimony" (*ibid.*). Finally, the court ruled that petitioner's trial counsel was not ineffective because he failed to use a memorandum written by a key government witness to impeach that witness; the court noted that that memorandum did not directly contradict the witness's testimony (*id.* at 7).

ARGUMENT

1. Petitioner contends (Pet. 8-21) that the information contained in the affidavits of Steadman, McClain, and Weisbrod was information favorable to her that should have been disclosed by the government under *Brady* v. *Maryland*, 373 U.S. 83 (1963), and *United States* v. *Agurs*, 427 U.S. 97 (1976). See also *United States* v. *Bagley*, No. 84-48 (July 2, 1985). This contention does not merit review for several reasons.

First, even if the statements in the affidavit were *Brady* material, petitioner would be entitled to relief "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the [trial] would have been different." *Bagley*, slip op. 14 (opinion of Blackmun, J.); see *id.* at 1 (White, J., concurring). Compare *Agurs*, 427 U.S. at 112-113, with *Strickland* v. *Washington*, No. 82-1554 (May 14, 1984), slip op. 24. As the courts below explained, the statements in the affidavits did not meet this standard. Weisbrod's affidavit contained an account of why petitioner kept two sets of appointment books; but the district court found that these statements "merely reiterate[] Weisbrod's testimony at trial [and they] * * * constitute[] mere cumulative evidence" (Pet. App. B 4). Otherwise, the affidavits consisted primarily of statements by the affiants that they believed that petitioner acted in good faith (*e.g.*, Pet. App. C 3-4) and criticism of the prosecutors and assertions that they brought "pressure[]" to bear on the affiants (*e.g.*, Pet. App. D 1, E 1, 2). As the district court ruled, the affiants' personal opinions about petitioner's good faith were inadmissible (Pet. App. B 4-5; see Fed. R. Evid. 701), and their allegations of prosecutorial misconduct not only were vague and unsubstantiated but contained no suggestion that any witness changed his testimony in response to the pressure (Pet. App. B 5-6).

In any event, petitioner's characterization of the statements in the affidavits as *Brady* material is incorrect. Petitioner was acquainted with the affiants and knew that they might have evidence relevant to her defense. The prosecutors, far from concealing the affiants or suppressing their testimony, called them as witnesses at trial and exposed them to cross-examination by petitioner. Consequently, this case simply does not involve "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Agurs*, 427 U.S. at 103. At

most, the affiants' statements are evidence "discovered from a neutral source after trial" (*id.* at 111); such evidence would entitle petitioner to a new trial only if she both showed that she could not reasonably have discovered this evidence before or during trial and "satisf[ied] the severe burden of demonstrating that [the] newly discovered evidence probably would have resulted in acquittal" (*ibid.*; footnote omitted). The findings of the district court leave no doubt that petitioner cannot make either of these showings.

2. Petitioner further contends (Pet. 24-35) that she is entitled to a new trial because the prosecutor improperly pressured the affiants. We note that when petitioner cross-examined the affiants at trial, she could have inquired into any prosecutorial pressure or intimidation, but she did not do so. Moreover, as the district court ruled (Pet. App. B 6), the affidavits contain only "vague allegations of 'pressure' " unsupported by any factual detail; the district court was therefore entitled to reject these allegations without holding a hearing. Cf. *Blackledge* v. *Allison*, 431 U.S. 63 (1977); *Machibroda* v. *United States*, 368 U.S. 487, 495-496 (1962). In any event, the affidavits do not suggest in any way that petitioner was prejudiced by any of the alleged misconduct of the prosecutors; on the contrary, Weisbrod specifically stated in his affidavit that despite being "pressured by threat" he "refused" to "change [his] story" (Pet. App. E 1). In the absence of any prejudice, such allegations of prosecutorial misconduct do not entitle petitioner to relief. See *Beck* v. *Washington*, 369 U.S. 541, 555 (1962); cf. *United States* v. *Hasting*, 461 U.S. 499 (1983); *United States* v. *Morrison*, 449 U.S. 361 (1980).

3. Finally, petitioner contends (Pet. 35-38) that her trial counsel rendered ineffective assistance by failing to question the affiants, when they testified at trial, concerning petitioner's good faith and lack of intent to defraud. This contention also does not merit review. To begin with, it was

not properly raised below. Petitioner did assert, before the court of appeals, that she had received ineffective assistance of counsel, but the basis of that claim was that her attorney had failed to interview prosecution witnesses, had failed to object to the admission of irrelevant and prejudicial testimony, and had not impeached a government witness. See Pet. App. A 5-7; pages 4-5, *infra*. As to each contention, the court below rejected petitioner's assertion of ineffective assistance. Petitioner did not assert, before the court of appeals, that her trial counsel was ineffective because he failed to cross-examine witnesses on her good faith. Since this contention was not presented to the courts below, it is not properly raised in this Court.

In any event, petitioner's current claim is without merit. As the district court noted, the only "evidence" contained in the affidavits concerning petitioner's good faith was cumulative testimony and the inadmissible opinions of the affiants. Trial counsel's failure to elicit cumulative and inadmissible material on cross-examination could not have prejudiced petitioner and therefore did not constitute ineffective assistance of counsel. See *Strickland*, slip op. 21-26.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

RANGELEY WALLACE
Attorney

JULY 1985

DOJ-1985-07